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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 228

JOHN McSHAIN, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

JOHN McSHAIN, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit made and entered in the above case on May 8, 1958 (Order denying a Petition for Rehearing entered June 10, 1958).

OPINIONS BELOW

The Opinion of the United States District Court for the District of Columbia (R. 38a-39a) is not reported. It is appended to this petition in the Appendix at pages 1a-2a. The Opinion of the Court of Appeals for the District of Columbia (R. 90-92) is not yet reported. It is appended to this petition in the Appendix at pages 3a-7a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was made and entered on May 8, 1958 (R. 93), and the Order denying a rehearing was entered June 10, 1958 (R. 120). A copy of said judgment of May 8, 1958, is appended to this petition in the Appendix at page 8a. Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

The Armed Services Procurement Act of 1947 provided that contracts for the armed services should be made by advertising, except that contracts "may be negotiated by the agency head without advertising" if one of seventeen listed conditions existed. The word "negotiated" was not defined in the Act. A regulation of the Corps of Engineers defined "negotiation" as "The procurement of supplies or services in the open market in a manner common among businessmen without securing formal advertising." A regulation of the Department of Defense stated "Negotiation means that method of procurement under which the procedures for procurement by formal advertising are not required."

Respondent sent to petitioner and other contractors written Requests for Proposals and written Contractor's Proposals. The Request for Proposals stated that proposals would be received "for the purpose of negotiating a construction contract." The Contractor's Proposal stated that the undersigned contractor "In compliance with your Request for Proposals" proposed to do the job in accordance with the drawings and specifications for a stated price. Petitioner and other contractors filled in various terms and prices in the

Contractor's Proposals and sent them to respondent. Respondent, without further communicating with petitioner, issued a third document known as a Notice of Award and Notice to Proceed, which stated that petitioner's proposal was accepted and petitioner should proceed with the work. Petitioner disputed that the interchange of the documents mentioned created a contract, and did not proceed with the work. The Secretary of the Army referred the dispute and the documents to the Comptroller General, who decided that no contract had been made and that petitioner had incurred no liability by its proposal. Thereafter, respondent brought suit against petitioner in the District Court for damages for breach of contract, and the District Court decided that the interchange of the documents did not make a contract. The Court of Appeals reversed. The questions presented are:

1. Whether petitioner's submission of its proposal to respondent, and respondent's consideration and acceptance of that proposal, constituted "negotiating a construction contract" within the meaning of the statement in respondent's Request for Proposals that proposals would be received "for the purpose of negotiating a construction contract".

2. Whether petitioner's proposal was an offer and respondent's Notice of Award and Notice to Proceed was an acceptance, making a contract.

3. Assuming that the Comptroller General's decision was wrong, but that Government paying officers would not have paid petitioner for work done on the basis of a contract established by the documents which the Comptroller General decided did not make a contract: Whether respondent is entitled to damages because petitioner did not proceed with the work.

STATUTES AND REGULATIONS

Appended to this petition at pages 9a to 14a of the Appendix, are pertinent portions of statutes and regulations as follows: The Armed Services Procurement Act of 1947, (41 U.S.C.A. Secs. 151 *et seq.*; Act of February 19, 1948, c. 65, Sec. 2, 62 Stat. 21), which was the statute in effect when the transaction involved in this case occurred, page 9a; The Act of August 10, 1956, (Title 10, U.S.C., Chapter 137, Secs. 2301 *et seq.*) amending and recodifying the original Act, pages 9a-10a; also The Act of June 10, 1921 (31 U.S.C.A.. Secs. 71, 74) (Budget and Accounting Act of 1921, as amended) relating to references of accounts to the Comptroller General and the effect of his findings, pages 10a-11a; also Orders and Regulations of the Engineers Corps, Department of the Army, Part I, Chapter VII, Sec. 7102.01 and Sec. 7102.02(b)(1), defining "negotiation", pages 11a-12a; and Armed Services Procurement Regulations (ASPR) 3-101, Code of Federal Regulations (CFR), Title 32, Chapter IV, Sec. 402.101, page 12a, defining "negotiation" and outlining procedure in negotiated procurement, and Army Procurement Procedures (APP) 3-101, C.F.R., Title 32, Chapter V, Sec. 592.101, relating to procedure in negotiated procurement, pages 12a-14a.

STATEMENT

Respondent filed a complaint in the United States District Court for the District of Columbia claiming damages from petitioner for breach of contract in failing to construct an underground Pentagon at Fort Ritchie, Maryland. Jurisdiction was invoked under 28 USC 1345. (R. 2a-3a). At the trial the respondent elected to rely for proof of the contract on three

documents prepared by respondent and exchanged between the parties, as follows:

1. A Request for Proposals (R. 4a-14a) which respondent sent to petitioner and other contractors. This Request stated that proposals would be received "for the purpose of negotiating a construction contract" for the work and provided "The right is reserved as the interest of the Government may require to reject any and all proposals and to negotiate with any proposer." (R. 4a).

2. A Contractor's Proposal (R. 14a-18a) sent by respondent to petitioner and other contractors and executed and returned by them to respondent. The Proposal stated "In compliance with your Request for Proposals * * * the undersigned hereby proposes * * * to * * * perform all work * * * in strict accordance with the specifications * * * (R. 14a) and agrees upon receipt of written notice of an award of the contract * * * that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *" (R. 17a).

3. A Notice of Award and Notice to Proceed [a single document] (R. 18a-19a), which respondent sent to petitioner without consulting or communicating with petitioner after receipt of petitioner's Proposal. This notice stated that petitioner's proposal had been accepted and that petitioner should proceed with the work.

Respondent rested its case on the above three documents, and Judge Letts entered judgment for petitioner. The Court found that respondent initiated negotiation proceedings with petitioner and that the transaction never got beyond the negotiation stage, and that when petitioner submitted its proposal it did not intend that it should be treated as a firm bid. The

Court concluded that respondent had failed to make out a prima facie case because the documents failed to show a binding and enforceable contract. (R. 38a-39a, Appendix to this petition, pages 1a-2a).

On appeal the Court of Appeals reversed, holding that the exchange of these documents made out a prima facie case and that petitioner should have been put to its proof. (Opinion of Court of Appeals, R. 90-92, Appendix to this petition, pages 3a-7a).

The Court ruled that respondent's Request for a Proposal to negotiate a construction contract was an invitation to make an offer; and that petitioner's submission of a Proposal in compliance with that Request in and of itself constituted petitioner's part of the negotiation, which the respondent could accept without any further act.

The Court commented that when petitioner submitted its proposal it could not conceivably have desired that respondent should reject it, and should expect that any further negotiations could mean only that the Government would try to get even better terms.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because the Circuit Court of Appeals has decided what petitioner and respondent agree is an important question of federal law affecting a substantial portion of all Government procurement which has not been but should be settled by this Court.

The respondent in its brief in the Court of Appeals stated at page 7:

> "This would appear to be the first time a court has been presented with a question as to the meaning of the word 'negotiation' in the Armed Services Procurement Act of 1947. The significance

> of this issue to armed forces procurement can hardly be overestimated. Its importance is perhaps underscored by the fact that over two-thirds of armed service contracts are procured by 'negotiation' within the meaning of that statute rather than by the statutory alternative of formal advertising."

The decision erroneously reads into the Armed Services Procurement Act of 1947 and its present recodified amendment, a definition of the word "negotiation" which permits the government to impose a contract on a contractor by soliciting proposals from contractors on the representation that they will be received for the purpose of negotiating a contract and then accepting one of the proposals without giving the proposer an opportunity to discuss the final terms of such contract. The decision rejects the idea of mutuality in negotiated procurement between the government and contractors.

It would permit the government to distort the method of procurement covered by advertising for final bids, by achieving the same result without putting potential proposers on notice of its intention to treat their proposals, requested for the stated purpose of negotiating a contract, as an advertised, final bid. There would be no need for both methods of procurement as permitted in the Act unless the word "negotiate" is given its regular, accepted meaning.

The logical result of this decision will be the elimination of negotiated procurement.

1. The decision below should be reviewed because it is in conflict with decisions of this Court holding that words used in a statute have the meaning understood by Congress when it enacted the legislation and are presumed to have been intended in their ordinary sense.

Addison v. *Holly Hill Fruit Products*, 322 U.S. 607, 618, 88 L. ed. 1488, 1496 (1944); *United States* v. *Stewart*, 311 U.S. 60, 63, 69, 85 L. ed. 40, 45, 48 (1940).

The Armed Services Procurement Act of 1947 was the statute in effect in the instant case. It provided that all purchases and contracts for supplies and services should be made by advertising except that contracts "may be negotiated by the agency head without advertising" if one of 17 listed conditions existed (Appendix to this Petition, page 9a). The word "negotiated" was not defined in the statute. Title 10, USC, Chapter 137, Secs. 2301-2314, (approved by Congress August 10, 1956) is a codification of the Armed Services Procurement Act of 1947. This codification, however, does not change the substance of the Armed Services Procurement Act of 1947 referred to above. In Sec. 2302 entitled "Definitions", it adds a new provision which states "'negotiate' means make without formal advertising." (Appendix to this petition page 9a) It is submitted that this adds no light as to a definition of the word "negotiate". Thus the Court of Appeals decision affects current procurement as well as procurement involved in the instant case.

The meaning of "negotiation" adopted in the decision below is contrary to its meaning in the dictionary, in the statute and in the regulations.

The dictionary meaning of negotiation is "the deliberation, discussion or conference upon the terms of a proposed agreement; the act of settling or arranging the terms or conditions of a bargain, sale, or other business transaction." (Black's Dictionary, 3rd ed.) In Webster's Collegiate Dictionary, 2nd ed. (1953) negotiation is defined as "To hold intercourse with a view to coming to terms; to confer regarding a basis of agreement".

The decision below, however, defined negotiation as "a process of submission and consideration of offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made." (Appendix to this petition, page 6a)

The Court of Appeals in its opinion does not purport to state a technical or special meaning of the word "negotiating". Respondent did not in that Court nor in the District Court seek by judicial notice or evidence to establish a special meaning. Respondent in its Request for Proposals represented that "Proposals will be received * * * for the purpose of negotiating * * * ", meaning that negotiating would occur after respondent received petitioner's proposal. All that occurred after respondent received petitioner's proposal was that respondent unilaterally considered it and accepted it. The effect of the Court's interpretation of the word "negotiation" is to transform the language in the Request for Proposals to mean substantially as follows:

> "Proposals will be received for the purpose of being considered and if one of them is acceptable, accepting it as a final construction contract".

The Request for Proposals is the only document in the case which indicates the purpose for which the Contractor's Proposals were to be received by respondent. This statement of purpose is basic to the whole transaction, as it shows the condition under which petitioner's proposal was delivered to respondent. This statement of purpose cannot be qualified by reference to interior provisions within the proposal itself, such as the provision quoted in the opinion below that petitioner "agrees, upon receipt of written notice of an award * * * that he will execute contract Form No.

R-5701 in accordance with the proposal as accepted." (Appendix to this petition, page 6a). *Cf. Peugh* v. *Davis*, 96 U.S. 332, 24 L. ed. 775 (1877); *Burke* v. *Dulaney*, 153 U.S. 228, 38 L. ed. 698 (1893).

The statement in the Request for Proposals that "* * * the right is reserved as the interest of the Government may require to reject any and all proposals and to negotiate with any proposer" (R. 4a) does not qualify the promise implicit in the first sentence of the Request to negotiate with the petitioner before *accepting* petitioner's proposal.

The Court's decision can only mean that "negotiation" confers on the government a one-sided right to insist upon more favorable terms for its own advantage with no corresponding right in a contractor to discuss better terms for itself, or contingencies not provided for in the proposal, or conditions that might arise after submission of a proposal, or the countless other things that are discussed among businessmen in transactions of this kind.

Admittedly, statutory provisions covering procurement are intended for the protection of the Government. But it is submitted that this does not permit the Government to represent it is using one method of procurement when its real intention is to use another.

2. The applicable regulations both defined and used the word "negotiation" in its ordinary sense.

O&R 7102.02(b)(1) (Orders and Regulations, Corps of Engineers, Department of the Army) defined "negotiation" as:

> "The procurement of supplies or services in the open market in a manner common among businessmen without securing formal competition * * *" (Appendix to this Petition, page 11a).

Army Procurement Procedures (APP 3-101) provided:

> "Conduct of negotiations. Procurement by negotiation is less automatic than and does not have the rigid limitations of formal advertising, bid and award procedures;"
>
> * * * * * *
>
> "After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform."
>
> * * * * * *
>
> "During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed:" (Appendix to this Petition, pages 13a-14a).

Armed Services Procurement Regulations, Sec. 3-101, under the subtitle "Negotiations as Distinguished from Formal Advertising" provides:

> "As used throughout this regulation, negotiation means that method of procurement under which the procedures for procurement by formal advertising * * * are not required".

Thereafter, in the same Section it is provided that the Contracting Officer must get statements and analyses of estimated costs and other vital matters when a contracting officer elects to use the negotiation method of procurement. Then the same Section provides:

> "Negotiations shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:
>
> * * * * * *

"(g) Individual bargaining, by mail or by conference;" (Appendix to this Petition, page 12a)

The Government did not require petitioner nor any other proposer on this project to put up a bid bond. If it had done so, petitioner would have been put on notice that its bid was final as where the Government uses the advertising-for-bids method.

3. The decision below gives the word "negotiation" a meaning contrary to what Congress understood it to have when it enacted the Armed Services Procurement Act of 1947.

Prior to the enactment of that Act government departments made representations to Congress as to what they had been doing when conducting "negotiations" and left Congress with the understanding that the same practice would prevail after the Act would be passed. (Appendix to this Petition, page 28a). It was stated to Congress in these representations that:

> "Procurement by negotiation as practiced by the services and industry consists of first securing informal quotations from as many sources as practicable, usually accompanied by breakdowns of elements of cost. Separate negotiations then usually begin with the lower bidders, in order to reduce the price by eliminating unnecessary or unjustified charges. When the best possible agreement has been reached, an appropriate contract is awarded the successful firm. Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. Negotiation, properly employed, can promote and intensify competition." (Appendix to this Petition, page 28a).

The foregoing representations and description of procurement practice made to the Congress prior to the enactment of the Armed Services Procurement Act of 1947, are set forth in a Report dated December 5, 1956 of the Subcommittee on Special Investigations of the Committee on Armed Services of the House of Representatives. (Appendix to this Petition, pages 15a-33a). The report was made after hearings had been conducted in connection with a Navy procurement practice. The Navy had issued a directive notifying proposers that when its negotiator was satisfied with the lowest proposal submitted the award would be made without further negotiation. (Appendix to this petition, page 16a) In its Request for Proposals the Navy further cautioned each proposer to submit its best offer since there might not be an opportunity accorded the proposer to revise its proposal. (Appendix to this petition, page 20a).

The subcommittee condemned this Navy practice stating:

> "Thus, in the subcommittee's view, there is a serious legal question as to whether or not the procurement method prescribed by this Navy directive is in fact a 'negotiation' as defined in the statute. Until such time as there is a definitive ruling, it seems to the subcommittee that the Department is proceeding upon very tenuous grounds." (Appendix to this petition, page 27a).
>
> * * * * * * *
>
> "We think this directive is not only unlawful but that it is an evasion of the statute. We think the procedure is unauthorized. We think it is unfair both to the Government and to the prospective bidders. More than that, we think it is arbitrary and a potential source of mischief and abuse. * * *" (Appendix to this petition, page 32a).
>
> * * * * * * *

"The departments have long argued for greater flexibility in the forming of contracts and have been given latitude for discussions in bargaining. Yet this regulation is just the opposite of bargaining. It removes all of the flexibility which is sought because it denies the opportunity for discussion. It deceives bidders no matter how artfully phrased.

"This regulation introduces an inflexibility which is the direct opposite of negotiation in the common usage of that term, in the statutory construction thereof and in the understanding of congressional intent as to the negotiations practiced by the departments and allowed by law in 17 specific instances." (Appendix to this petition, page 33a). * * *

A comparison of the Navy directive and the caution set forth in its Request with the Army Regulations and the language in its Request suggests that the condemnation of the Navy practice by the subcommittee would apply with greater force to the facts in the instant case.

4. The Comptroller General's decision would prohibit any government officer from paying petitioner for the job. In the Appendix to this petition, pages 34a-42a, appears the decision of the Comptroller General of the United States dated February 12, 1952, which is reported in 31 Opinions, Comp. Gen. 378. Petitioner submits that this Court can take judicial notice of the following facts:

a. That the question whether a contract was made by the parties to the instant case and covering the job in question was submitted to the Comptroller General by the Secretary of the Army, the contracting officer's superior. (Appendix to this petition, page 34a).

b. That the documents submitted to the Comptroller General by the Secretary of the Army included the same documents relied upon by respondent to establish the contract, that is to say, the Request for Proposals, (Appendix to this petition, page 34a); the Contractor's Proposal, (Appendix to this petition page 34a); and the Notice of Award and Notice to Proceed, (Appendix to this petition page 35a).

c. That the Comptroller General decided that no contract was made and that petitioner incurred no liability under its Contractor's Proposal. (Appendix to this Petition, page 41a).

Applicable statutes appear in the Appendix to this petition, pages 10a-11a. In sum they provide: All claims and demands by or against the government shall be settled and adjusted in the General Accounting Office. (31 USC 71) (Appendix to this petition, page 10a). Balances certified by the General Accounting Office upon the settlement of public accounts shall be final and conclusive upon the Executive branch (31 USC 74) (Appendix to this petition, page 10a); and the head of any executive department may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by said head or under him, which decision shall govern the General Accounting Office in passing upon the account containing said disbursement (31 USC 74) (Appendix to this Petition, pages 10a-11a).

In the Federal Bar Journal, October-December 1954, page 321, is an article "The General Accounting Office and Government Procurement" by J. Edward Welch, Assistant General Counsel, GAO. (Appendix to this petition page 42a) He states that as a protection against adverse action in the post audit, heads of gov-

ernment agencies may apply to the Comptroller General for a decision on any question involving a payment "to be made by them" (page 322). In order to minimize delay in making award of government contracts, contracting officers could submit directly to the Comptroller General for advance decision questions involving mistakes in bids. (*Id.*).

It is submitted that regardless of the correctness or incorrectness of the Comptroller General's decision, no disbursing officer of the Army would make a payment, nor would the Secretary of the Army approve a payment, for work done on the basis of a contract attempted to be established by the documents referred to. Hence the government, which foreclosed itself from paying petitioner for the job, should not collect damages because petitioner did not proceed with the work.

5. The decision below should be reviewed because it stands as a controlling precedent for future negotiated procurement and cannot be raised again after remand for trial as the record on any future appeal would be entirely different. The questions presented in this case are of great and recurring significance in connection with all government procurement pursuant to the Armed Services Procurement Act of 1947 as amended, by the method known as "negotiation".

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

CHARLES B. MURRAY

GEORGE F. SHEA

VINCENT P. MCDEVITT
General Counsel of Petitioner

APPENDIX

Oral Opinion of Judge Letts Granting Defendant's Motion to Dismiss

[R. 38a] (April 12, 1957)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1066-54

UNITED STATES OF AMERICA

v.

JOHN McSHAIN, INC., DEFENDANT

WASHINGTON, D. C., Friday, April 12, 1957.

The above-entitled action came on for further trial at 10:00 o'clock a. m., on Friday, April 12, 1957, in the United States District Court for the District of Columbia.

Before: Honorable F. Dickinson Letts, Judge.

Appearances: George F. Leonard, Esquire, and David U. Seaman, Esquire, Assistants to the Attorney General, on behalf of the United States; Charles B. Murray, Esquire, Nicholas J. Chase, Esquire, and George F. Shea, Esquire, on behalf of the defendant.

OPINION OF THE COURT

The COURT (Letts, J.). When the plaintiff closed its case and rested the defendant moved for a judgment in its favor.

The Court has considered the arguments and briefs submitted in support thereof and the arguments and briefs opposing such motion.

The Court is now prepared to rule.

My study and reflections have led me to the conclusion that the plaintiff has failed to make out a prima facie case.

My ruling will rest upon the record but perhaps I should specify my ultimate and controlling conclusion:

I find that plaintiff's contracting officer in fact initiated negotiation proceedings and that such was his avowed intention;

I find that the invitation was so understood by the defendant and that the defendant made his proposal in the spirit of such intended purpose;

[R. 39a] It seems clear that the contracting officer knew or certainly had reason to know that the defendant did not intend his proposal to be treated as a firm bind. Such contracting officer must have known that the defendant had a right to negotiate and that he was not surrendering that right in making his proposal upon the form presented to him by the contracting officer.

I further find that the transaction between plaintiff and defendant never got beyond the negotiating stage;

The proof which has been offered by plaintiff fails to show a binding and enforceable contract.

The defendant's motion for judgment is granted and a judgment for defendant will be entered of record.

(Thereupon the instant proceedings were concluded.)

Final Judgment

(April 16, 1957)

This case having come on for trial and the plaintiff having introduced its evidence and rested, and the defendant having moved for judgment, and the said motion and the opposition thereto having been fully argued by counsel for the parties in open court, and fully heard by the court, and the court having considered the briefs of the parties;

and the court having announced its opinion, findings of fact, and conclusions of law on April 12, 1957, it is by the court this 16th day of April 1957;

Adjudged, ordered and decreed that the motion of the defendant for judgment be, and it is hereby, granted; and that the cause be and it is hereby, dismissed with prejudice.

By the Court:

(S) F. DICKINSON LETTS,
Judge.

Presented by:

(S) Charles B. Murray
CHARLES B. MURRAY,
(S) George F. Shea,
GEORGE F. SHEA,
(S) Nicholas J. Chase,
NICHOLAS J. CHASE,
Attorneys for Defendant.

Opinion and Judgment

UNITED STATES COURT OF APPEALS.
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14084

UNITED STATES, APPELLANT

v.

JOHN McSHAIN, INC., APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided May 8, 1958

Mr. George S. Leonard, with whom *Assistant Attorney General Doub, Mr. Oliver Gasch*, United States Attorney,

and *Messrs. Paul A. Sweeney, Hershel Shanks* and *Samuel D. Slade,* Attorneys, Department of Justice, were on the brief, for appellant. *Mr. Lewis Carroll,* Assistant United States Attorney, also entered an appearance for appellant.

Mr. Charles B. Murray, with whom *Mr. George F. Shea* was on the brief, for appellee.

Before PRETTYMAN and WASHINGTON, Circuit Judges, and MADDEN, Judge, United States Court of Claims.*

MADDEN, *Judge:* This is an appeal from a judgment of the District Court for the District of Columbia, dismissing the plaintiff's suit for breach of contract, brought pursuant to 28 U. S. C. § 1345. The Government was the plaintiff. At the close of its case the defendant moved to dismiss the action on the ground that no contract had been proved. The motion was granted and a judgment of dismissal was entered.

The Government's evidence, which the District Court held insufficient to prove a contract, consisted of three documents. They were (1) a "Request for Proposals" for the construction of a building for the Government, copies of which document were sent to the defendant and several other contractors; (2) the submission to the Government by the defendant of a "Contractor's Proposal"; and (3) the issuance by the Government to the defendant of a "Notice of Award and Notice to Proceed."

The defendant refused to perform the alleged contract; the Government had the building built by another contractor at a price higher than the price named in the defendant's "Contractor's Proposal," and brought the instant suit to recover damages for the defendant's alleged breach of contract.

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* Sitting by designation pursuant to provisions of Sec. 291 (a), Title 28, U. S. Code.

The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. § 151 *et seq.*, now recodified as 10 U.S.C. § 2301 *et seq.*, provides in section 151 (c) that under certain circumstances contracts "may be negotiated by the agency head without advertising." The circumstances of the contract in question were such that it could lawfully be negotiated without advertising.

The Government's "Request for Proposals," mentioned above, was a voluminous document containing general conditions, several hundred pages of specifications, and incorporations by reference of a large number of drawings. It set 3:00 p.m., 2 October 1951 as the date and hour before which sealed proposals would be received

> for the purpose of negotiating a construction contract for furnishing all plant, labor, materials and equipment and performing all work for the above-described project in strict accordance with the specifications, schedules, addenda and drawings as follows * * *.

It said that the proposer who was awarded the contract would be required to execute the Army Contract Form for construction contracts. It said:

> The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer.

The Government's second document introduced in evidence was the defendant's "Proposal" dated October 2, 1951. It says

> In compliance with your Request for Proposals * * * the undersigned hereby proposes to furnish the plant, labor, materials and equipment and perform all work for the above-described project in strict accordance with the specifications, schedules, drawings and addenda
>
> * * * * *

> for the consideration of * * * $6,574,825. * * * and agrees, upon receipt of written notice of an award of the contract within thirty days after the date of opening of the proposal, that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *.

The Government's third document was its "Notice of Award and Notice to Proceed," addressed to the defendant, and saying

> You are hereby notified that your proposal dated 2 October 1951, in the total amount of $6,574,825.00 * * * is accepted * * *.
>
> * * * * *
>
> This is your formal notice to proceed with the work under the contract. * * *

The defendant's answer admitted the allegation of the complaint that "Defendant did not * * * proceed with the work * * *."

We see, in the above-described documents introduced by the Government, a text-book example of a contract. There was an invitation to the defendant to make an offer, an offer, and its acceptance. The defendant says that the invitation was an invitation to it to submit something which would be the subject of a "negotiation." Negotiation is a process of submission and consideration of offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of the haggling does not remove it from the definition of negotiation. If the first offer is accepted, the negotiation is concluded and a contract is made, just as it would be if the fifth or the fiftieth offer had been the accepted one.

The defendant, when it submitted its proposal, could not possibly, unless because of some extraneous circum-

stance which eludes our imagination, have desired that the Government reject its proposal and begin negotiations. That could only have meant that the Government would try to beat down the price, or add to the required work, or somehow get a more favorable bargain for the Government.

The only question before the District Court was the question of the interpretation of written documents. That is a "question of law" as to which this court is not bound by the "clearly erroneous" provision of Rule 52 (a). *McWilliams Dredging Company v. United States*, 118 C. Cls. 1 (1950); *Dollar* v. *Land*, 87 U. S. App. D. C. 214, 184 F. 2d 245, 248-249 (D. C. Cir. 1950), *cert.* denied 340 U. S. 884, rehearing denied 340 U. S. 948. Our conclusion is that the ruling of the District Court on the defendant's motion to dismiss was erroneous. The Government having made a prima facie case, the defendant should have been put to its proof. The question whether that proof will refute the Government's claim is not, of course, before us, and we intimate no view concerning it.

The judgment of the District Court must be reversed and the case remanded.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,084

UNITED STATES, *Appellant*,
v.
JOHN McSHAIN, INC., *Appellee*.

April Term, 1958.
C. A. 1066-54
United States Court of Appeals for the District of Columbia Circuit
FILED May 8 1958
JOSEPH W. STEWART
Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman and Washington, Circuit Judges, and Madden, Judge, United States Court of Claims.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for a new trial.

Dated: May 8, 1958

PER JUDGE MADDEN.

STATUTES AND REGULATIONS
(Pertinent Portions)

Armed Services Procurement Act of 1947
Chapter 65—Public Law 413

(80th Congress, 2nd Session)

Act of February 19, 1948, c. 65, Sec. 2, 62 Stat. 21. 41 USCA 151, et seq.

This Act may be cited as the "Armed Services Procurement Act of 1947".

Sec. 2 * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress; * * *

(17) * * *

Sec. 9. As used herein—

(a) The term "agency head" shall mean * * *

(b) The term "supplies" shall mean * * *

Sec. 10 * * *

Act of August 10, 1956, 70A Stat. 641, c. 1041, Sec. 53, 10 USC. Chapter 137, Secs. 2301, et seq.

Section 2301. Declaration of Policy.

2302—Definitions.

In this chapter—

(4) "Head of an agency" means * * *

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by Section 2305(a) and (b) of this title. * * *

2304. Purchases and contracts: Formal advertising; Exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) * * *

(17) * * *

Act of June 10, 1921, c. 18, Title III, 42 Stat. 24; 31 U. S. C. A. 71 et seq. (Budget and Accounting Act of 1921, as Amended)

Sec. 71. *Public accounts to be settled in General Accounting Office.*

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

* * * * * * *

Sec. 74. *Certified balances of public accounts; conclusiveness; suspension of items; preservation of adjusted accounts; decision upon questions involving payments.*

Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, * * *

* * * * * * *

Disbursing officers, or the head of any executive department, * * * may apply for and the Comptroller General

shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement. July 31, 1894, c. 174, Sec. 8, 28 Stat. 207; June 10, 1921, c. 18, Title III, Sec. 304, 42 Stat. 24; Oct. 25, 1951, c. 562, Sec. 3(1), 65 Stat. 639.

Orders and Regulations (O&R), Engineers Corps, Department of the Army, Part I, Chapter VII

7102.01 *Basic Policy.* Procurement will generally be effected by advertising for bids and thereafter awarding the contract to the lowest responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. However procurement will be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in paragraph 7102.02b. Bids will be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of the required supplies or services. Current lists of bidders will be maintained by each field installation and activity performing procurement or construction activities. No award of contract either pursuant to advertising or as a result of negotiation will be made where the total contract price is more than 50% in excess of the Government estimate of cost (see paragraph 4106.05c and 7103.03).

7102.02 *Methods of Contracting.*

a. *By advertisement* * * *

b. *By Negotiation.*

(1) *Definition.* The procurement of supplies or services in the open market in a manner common among businessmen without securing formal competition. However under

such circumstances the very absence of formal competition will require the solicitation of quotations oral or written regarding price, quality and other factors.

Armed Services Procurement Regulations (ASPR) 3-101, CFR. Title 32, Chapter IV, Sec. 402.101

Negotiations as Distinguished from Formal Advertising. As used throughout this regulation, negotiation means that method of procurement under which the procedures for procurement by formal advertising, as set forth in Part 401 of this Subchapter are not required. Whenever supplies or services are to be procured by negotiation, price quotations, supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the Contracting Officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the Contracting Officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Subpart C of Part 400 of this Subchapter, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiations shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:

* * * * * * * *

(g) Individual bargaining, by mail or by conference;

* * * * * * * *

Army Procurement Procedure (APP) 3-101; CFR. Title 32, Chapter V, Sec. 592.101, 16 F.R. 4019

Negotiation as Distinguished From Formal Advertising

(a) *Competition.* The fact that a procurement is to be negotiated does not relax the requirements of competition. When supplies or services are to be procured by negotia-

tion and when consistent with the accomplishment of procurement objectives, quotations or proposals will be solicited from all such qualified sources of supplies (as defined in Secs. 400.201-9 and 590.201-9 of this title) or services as are deemed necessary to insure effective competition in order that the procurement be made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Subpart C of Part 400 and Part 590 of this title.

(b) *Conduct of negotiations.* Procurement by negotiation is less automatic than and does not have the rigid limitations of formal advertising, bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform.

(2) Negotiation in accordance with the provisions of Sec. 592.101 will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential sup-

pliers must be informed of the provisions which will appear in the contract to be executed. (See also ASPR and APP 3-401) (See also Sec. 402.401 of this title and Sec. 592.401)

* * * * * * *

(c) *Request for proposals.*

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, a request for proposals, similar to WD Form 104 (Request for Proposal and Contractor's Proposal, Short Form) or WD Form 105 (Request for Proposal and Contractor's Proposal, Long Form) will be issued. (See Sec. 596.577 and 596.578 of this title.)

* * * * * * *

Study of Armed Services Procurement Regulations, Sections 1-605 and 2-302 and Navy Procurement Directive 3-002.1

REPORT

OF THE

SUBCOMMITTEE FOR SPECIAL INVESTIGATIONS

OF THE

COMMITTEE ON ARMED SERVICES

HOUSE OF REPRESENTATIVES

EIGHTY-FOURTH CONGRESS

SECOND SESSION

UNDER THE AUTHORITY OF

H. Res. 112

DECEMBER 5, 1956

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STUDY OF ARMED SERVICES PROCUREMENT REGULATIONS

III. [3318] NAVY PROCUREMENT DIRECTIVE 3-002.1. PROPOSED DEPARTMENT OF DEFENSE REGULATION 3-705. AWARDS ON NEGOTIATED PROPOSALS WITHOUT FURTHER DISCUSSION WITH BIDDER

The subject is one as to which the subcommittee makes a finding and recommendation.

Navy Procurement Directive 3-002.1 is also the subject of a proposed Armed Services Procurement Regulation to be amended as section 3-705. The discussion and detail of this regulation follows:

[3319] · NAVY PROCUREMENT DIRECTIVE NO. 3-002.1
ARMED SERVICES PROCUREMENT REGULATION NO. 3-705
(PROPOSED)

The Navy Department has for some time had the following directive:

3-002 Conduct of Negotiations in Competitive Fixed-Price Procurement

3-002.1 The following policies and practices are established throughout the Navy for the conduct of negotiations which are to result in fixed-price types of contracts awarded on the basis of price competition.

a. *Where the negotiator is satisfied* from the proposals submitted *that there has been adequate competition and that the low price or prices are reasonable, award should be made without further negotiation* as to price to that responsible firm submitting the proposal which is most advantageous to the Government. *In such cases it is the policy of the Navy not to attempt to reduce the initial quotations by further negotiation.*

b. *Where the negotiator considers that the initial quotations are too high* or where there is inadequate pricing knowledge to justify an award on the basis of the initial quotations, *further negotiations shall be conducted in accordance with the following policies:*

(1) Where a responsible firm submits a quotation which is substantially lower than those submitted in all other proposals, negotiations may be conducted only with that firm.

(2) Where several firms submit quotations which are so grouped that a moderate reduction in price might make any one of the group low, negotiations will normally be confined to firms within such grouping. Whenever negotiations are conducted with more than

one firm there shall be a strict avoidance of "auction" techniques. *No information regarding the number or identity of the firms participating in the negotiations shall be made available to anyone whose official duties do not require such knowledge.* Furthermore, no indication shall be made to any firm of a price which must be met to obtain further consideration. To this end, whenever negotiations are being conducted with several firms, while such negotiations may be conducted successively, all firms participating in such negotiations shall be offered the opportunity to submit such revisions in their quotations as may result from the negotiations up to a time designated by the negotiator. The designated time shall be the same for all firms involved in the negotiation and shall provide adequate opportunity for all such firms to submit revised proposals.

(3) *All firms shall be informed that after the submissions of such final prices, no further unsolicited revised*
[3320] *quotations will be considered and no information will be furnished to any of the firms which submitted quotations until award has been made.*

[Italic supplied.]

On July 19, 1956, while the subcommittee had these subjects under consideration after adjournment from prior hearing of June 14, 1956, Brig. Gen. William K. Ghormley, in testifying before the subcommittee, stated that "the Department of Defense has tentatively approved for Defensewide use guidelines for the conduct of negotiation" which would adopt Navy procedure quoted above.

General Ghormley then submitted to the subcommittee the proposal which, he testified, had been tentatively adopted to amend Armed Services Procurement Regulation 3-705 in the following particulars and manner:

CASE 54-79—PROPOSED REVISION TO ASPR-3-705

3.705 Selection of Contractors for Negotiation and Award

(a) Where the contracting officer is satisfied, from the proposals submitted, that there has been adequate competition and that the low price or prices are reasonable, award may be made without further negotiation as to price to that responsible firm submitting the proposal which is most advantageous to the Government. In such cases, it is the policy of the Department of Defense not to attempt to reduce the initial price quotations by further negotiation.

(b) Where the contracting officer considers that the initial quotations are too high or where there is inadequate pricing knowledge to justify an award on the basis of the initial quotations, further negotiations shall be conducted in accordance with the following policies:

(i) Where a responsible firm submits a quotation which is substantially lower than those submitted in all other proposals, negotiations may be conducted only with that firm.

(ii) Where several responsible firms submit quotations which are so grouped that a moderate reduction in price might make any one of the group low, negotiations will normally be confined to firms within such groupings.

Whenever negotiations are conducted with more than one firm there shall be a strict avoidance of "auction" techniques. No information regarding the number or identity of the firms participating in the negotiations shall be made available to the public or to anyone whose official duties do not require such knowledge.

Furthermore, no indication shall be made to any firm of a price which must be met to obtain further consideration. Whenever, in the course of negotiation, a substantial change is made in the Government's re-

quirements, for example, increases or decreases in quantities or material changes in the delivery schedules, all firms involved in the negotiation will be given further opportunity to submit revised proposals under the revised requirements. To this end, whenever negotiations are being conducted with several firms, while such [3321] negotiations may be conducted successively, all firms participating in such negotiations shall be offered an equitable opportunity to submit such revisions in their quotations as may result from the negotiations.

All firms shall be informed that after the submission of such final prices, no information will be furnished to any of the firms which submitted quotations until award has been made.

(c) Deviation from the above general policy is authorized in appropriate cases when buying research and development, special services (such as architect-engineer services) or when cost reimbursement type contracting is anticipated. The decision that a price is fair and reasonable may be properly influenced by the technical proposal promising the greatest value to the Government in terms of possible performance, ultimate productibility, growth potential, and other factors bearing upon "state-of-the-art" considerations rather than the proposal presenting the lowest estimate of price or probable cost and fixed fee.

The nature of the procurement, ability of a contractor to perform, or the reasons for use of a cost reimbursement type contract may be the controlling factors in making the selection.

It will be observed that subparagraph (a) is identical with the Navy directive cited. Subparagraph (b), (i) and (ii) are identical with the Navy directive cited. Paragraph (c) in the Department of Defense proposed directive, above

cited, is not included in the same manner in the Navy directive.

Our consideration of these two directives relate to subparagraphs (a) and (b) of both the Navy directive and the tentatively approved Department of Defense proposed directive.

The subcommittee in 1955 received a protest concerning the use of the procedures outlined in the Navy directive, supra, and conducted correspondence with the Comptroller General concerning a protest lodged with that office.

In the subject matter under protest to the Comptroller General, the invitation for proposals issued by the Armed Services Petroleum Purchasing Agency under RFP 56-N-14 in paragraph 13 contained the following information:

> The proposal shall serve as a preliminary basis for negotiation of a definitive Service Contract and a separate Facilities Contract with that Offeror(s) whose proposal is considered to be in the best overall interest of the Government. Your proposal should be submitted by filling in the blank spaces in the attached Schedule. However, alternate proposals of any type, that can be evaluated on a common basis with other proposals will be considered only if in the best interest of the Government so to do.

Subsequent to that text, the Navy Department issued a revised invitation which contained the following language:

> Each Offeror is cautioned to submit in response to this Request for Proposals its best offer since, after the date estab- [3322] lished herein for the receipt of proposals, THERE MAY NOT BE an opportunity accorded the Offeror to revise its proposal.

The Comptroller General's case number relating to this subject matter is B-125770, and appears in the exchange

of the Comptroller with the Department of the Navy in the hearing.

The Comptroller General in a letter dated January 5, 1956, requested to be advised by the Secretary of Defense—

> * * * whether it is the view of your Department that the negotiation procedures prescribed by the (this) Navy directive above-quoted are sufficient to secure for the Government "the best possible agreement," as apparently contemplated by the Congress, and the "full and free competition" provided for by the applicable provision of the Armed Services Procurement Regulation.

Under date of February 16, 1956 (see hearing), the Assistant Secretary of Defense for Supplies and Logistics replied:

> Our experience has established the belief that, whatever may be the particular problem, we must find a way to cause the potential contractor to provide his best quotation. We believe that this can best be accomplished if he is not assured that there will be further individual bargaining. If so assured, he will, without question, present his quotation in such a way as to include a contingency allowance for negotiation purposes. In the latter instance, we can never be certain that the bargaining will result in removing such allowances. It must be pointed out that if the contracting officer believes that the lowest quotation which he has received is not reasonable, the Government has kept open its option to "bargain" to obtain reasonable pricing.

The Department of Defense thereupon advised that it was in the process of development of price negotiation policies and practices and that the procedure embodied in the Navy directive had been considered and "it was deter-

mined tentatively to adopt this procedure for DOD-wide use."

This subject came before the full committee at a hearing on January 15, 1956 (Print 42, Full Committee Proceedings, p. 5197 et seq.), concerning the use of the emergency exceptions permitted under section 2 (c) (1) of the Armed Services Procurement Act of 1947 (now title 10, U. S. Code Annotated, sec. 2304 (a) (1), act of August 10, 1956). At that time, the chairman of the full committee stated that this regulation was "too restrictive along that line" (p. 5208). He pointed out that the Assistant Secretary of the Army (Higgins), testifying as the principal witness for all three services, had asserted that there was as much competition in negotiation as in competitive (advertised) bidding. The chairman commented: "But that doesn't exist in view of these Navy regulations. And that is the only criticism that I have to make about the Navy viewpoint." There was no dissent expressed by the committee to the statement of the chairman on these observations.

The defense of this type of regulation is that under the Armed Services Procurement Act everything that is not "formal advertising" [3323] becomes something else which, for lack of a better term, is called "procurement by negotiation."

In discussing the matter before the subcommittee, a Navy representative stated:

> There is no connotation in this whole procedure which would allow us to conclude that it is an extension of our authority to negotiate. The authority to negotiate must be there and authorized by Public Law 413 before we can enter into this procedure.

Summarized

The Navy Department and, in turn, the Department of Defense defend the procedure outlined in these regulations

upon the theory that it is their duty to require, and the bidder's duty to propose initially, a price proposal which, in the sole judgment of the contracting officer, is the best price proposal which he will offer for services or supplies. All this is to be on the first submission to avoid "auction" techniques. Bidders who do not respond with final figures on an initial request for a proposal to negotiate, for having failed to give their ultimate and final figures on their first submission are to be punished by being excluded. The contracting officer is set up as the final judge and sole arbitrator of compliance with this norm of conduct and may award to that person submitting an initial proposal which in his opinion represents the lowest price that any bidder will submit.

During the course of the hearings, the question was asked whether this procedure was designed to procure supplies and services by negotiation "in the best interests of the Government" and at the lowest possible price, or whether in fact it was not a weapon to punish the reluctance of bidders responding to invitations who, in the opinion of the contracting officer alone, did not submit full and final figures, but were waiting for further discussions.

Since the hearings, above referred to, Congress has passed a codification of laws relating to the Armed Forces. Title 10, United States Code, the act of Congress approved August 10, 1956, incorporates in a codification the Armed Services Procurement Act of 1947 (Public Law 413, 80th Cong.) as chapter 137, sections 2301 to 2304.

Section 2 (c) of that act provided that—.

> All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if * * *.

Then followed a list of 17 exceptions.

Title 10, United States Code, section 2304, the codification of the statutes has the following language (as a substitute for the language above cited from sec. 2(c)):

> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

There follows, in the codification, an exact repetition of the 17 exceptions contained in the original act.

[3324] The reviser's report (S. Rept. 2484, 83d Cong., 2d sess.) makes no reference to the fact that the word "all," preceding the word "purchases," was dropped in the codification.

The revisers' notes merely say that section 2304 (a) is derived from title 41, section 151 (c) (less proviso of clause 1 and proviso of clause 16). There is no further explanation.

The Armed Services Procurement Act of 1947 (act of February 19, 1948, 6 Stat. 21) did not define the word "negotiate" as used in that act.

However, the reviser, in the codification which now is title 10 of the United States Code, has added an additional section 2302, headed "definitions," which reads:

> In this Chapter—"Negotiate" means make without formal advertising.

That definition is not in the basic law.

There has also been an additional definition added:

> (3) "Formal advertising" means advertising as prescribed by section 2304 (a) and (b) of this title.

Section 2305 of title 10 is a repetition of section 3 of the Armed Services Procurement Act with only inconsequential changes in language.

Senate Report 2484, 84th Congress, 2d session, on page 144, gives the revisers' explanation of section 2302 as having been derived from United States Code, title 41, section 158 (less clause b) or 62 Statutes 24 less clause b.

The revisers' explanation of clauses 2 and 3 above cited is as follows:

> Clauses (2) and (3) are inserted for clarity and are based on the usage of those terms throughout the revised chapter.

Department of Defense views seem to have leaked through to the codifiers.

The Armed Services Procurement Act of 1947 does not define what the word "negotiation" nor what the word "negotiate" means, as used in that act. A definition has now been supplied by the code.

Our question then concerns the application of the definition supplied in the codification of the basic law to the procedures we have under discussion and to usage of the word "negotiate" as a matter of statutory construction as defined in the basic law.

In the testimony before the full committee on January 10 through 13, 1956, the Assistant Secretary of the Army observed that, as used by the Department of Army, "negotiation is any method of procurement other than 'formal advertising.'"

However, section 3-101 of Armed Services Procurement Regulations defines the word "negotiation" as used in those regulations as—

> that method of procurement under which the procedures for procurement by formal advertising as set forth in section II are not required.

That statement in the Armed Services Procurement Regulations follows the language of the law.

But, apparently, the Department of Defense and its subordinate departments have come to the conclusion that what

is not "formal- [3325] advertised competitive bidding" is perforce "negotiation" as intended by the Congress.

This construction seems to be prevalent in the executive branches. A representative of the Navy Department testified that—

> everything that is not formal advertising then becomes something less and that something less we call, for lack of a better term, "procurement by negotiation."

The subcommittee finds itself at this point inquiring as to what the word "negotiate" means and what the procedure "negotiation" means as defined in the basic law.

On the face of it, it is quite apparent that the word "negotiation" as used in the common acceptance of the term and even as understood by representatives of the Navy is a definition different from the one proposed in the regulations and that contained in the codification.

A definition of "negotiation" contained in the standard dictionary contradicts both the Navy directive and Assistant Secretary Higgins' conclusions, above cited. A Navy witness cited the standard dictionary. He found, as anyone can, that the word "negotiation" as defined in the standard dictionary is "to hold intercourse with a view to coming to terms, to confer regarding a basis of agreement, as to negotiation for the purchase of a home." And he found in the same source that "negotiation" means "a parley or conference regarding terms." If the dictionary is to be followed, there must be a parley or conference regarding terms; otherwise, there is not a negotiation.

If, therefor proposals are accepted without discussion (even with one proposer) there is, in simple terms, no "parley or discussion."

The word "negotiation" derives from the Latin and in the civil law means "trading or deliberations leading to an agreement."

The Pennsylvania Supreme Court[1] says that negotiations are what pass between parties incident to the making of a contract and that—

> unless discussion could be brought to a point whereby the interest of the proposed buyer can be aroused or the terms of a sale discussed, it cannot be classified as negotiation.

The Florida Supreme Court,[2] in construing a statute which authorizes trustees to negotiate for the lease of mineral rights, said that the word meant to "discuss or arrange a business transaction." To the same effect are other cases.[3]

It thus becomes apparent that the essence of negotiation both in common use, in statutory construction and definitions by the courts is "discussion, conversations, parleys." Nowhere is it suggested by the courts that if "discussions or parleys" are eliminated, the transaction constitutes "negotiation."

There is, therefore, an abundance and unanimity in construction of the word "negotiate" both in the courts and in common use.

Thus, in the subcommittee's view, there is a serious legal question as to whether or not the procurement method prescribed by this Navy [3326] directive is in fact a "negotiation" as defined in the statute. Until such time as there is a definitive ruling, it seems to the subcommittee that the Department is proceeding upon very tenuous grounds.

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[1] *Werner* v. *Henricks*, 182 Atl. 748, 9 (Penn.).

[2] *Watson* v. *Halloran*, 20 So. 2d 388 (Fla.).

[3] *King* v. *Silvers*, 37 NE 413, 416 (Ind.); *Northrup* v. *Diggs*, 106 SW 1123 (Mo. App.); *Intermountain Title Co.* v. *Egbert*, 16 Pac. 2d 390 (Idaho); *Modern Furniture Co.* v. *Dubuque Fire and Marine Insurance Co.*, 191 NE 637, 638 (Mass.); *Aurora State Bank* v. *Hayes-Eames Elevator Co.*, 129 NW 279 (Neb.); *Newport National Bank* v. *Board of Education*, 70 SW 186, 24 (Ky.); *People* v. *Augustine*, 204 NW 747 (Mich.).

The problem is compounded when we go back to the only expression upon what constituted "negotiation" as considered by the Congress at the time the Armed Services Procurement Act was passed.

For that purpose we refer to House Report 109, 80th Congress, 1st session, wherein Congress adopted the representations of the departments as to what they did when conducting "negotiations," and, we think, obviously approved practice described as being "negotiation" as it would be conducted when the act passed. It follows:

> Procurement by negotiation as practiced by the services and industry consists of first securing informal quotations from as many sources as practicable, usually accompanied by breakdowns of elements of cost. Separate negotiations then usually begin with the lower bidders, in order to reduce the price by eliminating unnecessary or unjustified charges. When the best possible agreement has been reached, an appropriate contract is awarded the successful firm. Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. Negotiation, properly employed, can promote and intensify competition.

Congress stated that the Armed Services Procurement Act in its view "narrowed the circumstances in which contracts may be negotiated * * *"

We find a very substantial flaw in the Navy Department's existing directive and the DOD proposal.

We do not think that title 10 of the code has expressed the intent of Congress by such a definition of "negotiation."

A witness for the Navy Department in defending its procedure and proposal very properly observed, as this subcommittee does, that the "negotiation" in the act must be under 1 of the 17 exceptions prescribed.

If we consider the procedures authorized in these 17 exceptions as "negotiation," for want of a better descrip-

tion; then we are not puzzled by the adoption of the word "negotiation" as meaning everything else but formal advertising.

To accept the departmental position, we must agree that the procedures outlined in the 17 exceptions is "negotiation" in each instance. Now we are required to go further and agree that "negotiation" is everything other than formal advertising.

When the act is suspended, the method of procurement is not prescribed. What has been excluded is the strict formal advertising for competitive bids. But that does not amount to a statutory definition or the explanation of what "negotiation" shall consist of when any 1 of the 17 exceptions is used.

We must look to other sources for help:

(1) What evidence was there before the Congress at the time it adopted and used the word "negotiation" in its statute? That, we have pointed out. It is at complete variance and negates not only the principle but the language contained in these directives; and

[3327] (2) If there were no definition, then we must adopt—

(a) Statutory construction of the word "negotiation"; or

(b) Use of the word "negotiation" in the common acceptance of the term without regard to restricted legal usages.

After all, as the Supreme Court of the United States said, in the case so frequently cited by the Comptroller General (*U. S.* v. *Purcell Envelope Company*, 249 U.S.C. 313):

"* * * it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidders as to insist upon its own."

Certainly the opportunity of competing for public business as that Court has said ought not to be fitted out with new conceptions in the use of a common word. The Government is procuring supplies from a variety of bidders; not from the United States courts.

SUMMARY

The issue presented by the Navy procurement directive and the proposed Defense Department directive is what constitutes "negotiation" within the meaning of the statute.

What this procedure amounts to is this: It is an assertion by the Department that "negotiation" as defined in the statute means merely and is limited to a request for proposals without the Government being under any obligation to discuss their proposals with a bidder or bidders.

We have pointed out that in the common usage of the term, in the statutory construction of the same, and in the subcommittee's understanding of the practice of the Department as represented to it prior to the passage of the Armed Services Procurement Act, "negotiation" meant a discussion or a parley—something more than merely extending a written invitation to submit proposals and accepting one of those proposals.

A further query then is, In the absence of any discussions (even through the bid documents may warn the bidder that discussions may not ensue), has the Government exonerated itself of its responsibility and is it acting within the scope of the powers conferred by the Congress? That is a serious question.

We would understand that these prospective bidders were expected to negotiate as the invitations state; and that the very need of inviting proposals instead of sealed competitive bids is based on an administrative finding that negotiation is needed to iron out any difficulties, differences, or prices during the discussion procedures.

Where a bidder is invited to submit a proposal for negotiation, can it be said that this bid is fully responsive when either the bidder or the bid documents suggest that his proposal may be treated as a straight offer which may be accepted without change and constitutes a contract? We think that such is not the intent of the Congress. The Comptroller General's opinion does not support such a construction. (See 35 C.G. Opinions 167.)

Further, how can such a proposal constitute a firm offer on the part of the bidder which may be accepted by the Government? It is at best only an alternative and other bidders do not have the same alternative; i.e., making a firm offer. Can a proposal to discuss the subject in [3328] negotiation constitute a contract without further action by both parties? See 31 C.G. 383; Williston on Contracts, section 27; Corbin Contract, section 24; *Buckberg* v. *Washburn Crosby Company* (93 SW 733). In *Heyer* v. *U. S.* (140 Fed. Sup. 409), the court observed that a bidder had a right to have his bid honestly and fully considered.

The subcommittee is not convinced that this procedure is authorized by statute or that it constitutes negotiation as permitted by Congress. But if the argument of the departments is correct and if this is an authorized procedure, then the very method employed—i. e., acceptance of a proposal without discussion even with the low bidder—constitutes an evaluation of all bids, a determination of the lowest bid, the determination of the responsive and responsible bidder, and a finding that no discussions are required in order to form a contract between the parties with respect to any of the details of the proposal.

If all of these elements are present (and they must be in order to make such an award under the Navy procurement directive) then there is no reason in the world why that bidding could not have been accomplished by formal advertised competitive bid as prescribed in the statute.

We think this directive is not only unlawful but that it is an evasion of the statute. We think the procedure is unauthorized. We think it is unfair both to the Government and to prospective bidders. More than that, we think it is arbitrary and a potential source of mischief and abuse. It is not necessary to the procurement process.

Congress permits discussions by way of negotiation between purchaser and seller in certain cases in order to form a contract in the best interests of the Government and at the price most favorable to it.

Congress has said that every other procurement must be in the traditional American system of free, open, advertised, competitive sealed bidding.

If discussions are not necessary in order to enter into a firm contract between seller and purchaser, then it is an admission that all the details are present in the invitation and the proposal to form a contract. If that be the admission, then invitation and bid are firm from the beginning; and there is no reason why that type of purchase cannot be accomplished at open, advertised, competitive bidding.

A denial for the need of discussion is an admission that the Government is able to purchase without discussion.

Conclusions and Recommendations

III. [3329] The subcommittee is wholly in disagreement with the provisions of Navy Procurement Regulations 3-002.1 and the proposal of the Department of Defense to make the same "Department of Defense-wide" by a proposed amended section 3-705 of the ASPR's.

We feel that this regulation is wholly unauthorized. It defeats, in our opinion, the congressional purpose in permitting negotiations in certain cases; and it is, we believe, a potential source of abuse of administrative discretion. It

could be a source of great mischief within the departments administering the same.

The departments have long argued for greater flexibility in the forming of contracts and have been given latitude for discussions in bargaining. Yet this regulation is just the opposite of bargaining. It removes all of the flexibility which is sought because it denies the opportunity for discussion. It deceives bidders no matter how artfully phrased.

This regulation introduces an inflexibility which is the direct opposite of negotiation in the common usage of that term, in the statutory construction thereof and in the understanding of congressional intent as to the negotiations practiced by the departments and allowed by law in 17 specific instances.

Every argument for the use of this regulation is an argument against its necessity. If proposals can be evaluated and contracts let on proposal without any discussions or parleys, then there is nothing in the invitation which requires elaboration or discussion. In such circumstances, there is no reason why the contract cannot be let on advertised open competitive bidding as provided in the statute as the traditional American way of public contracting.

Unless this regulation is promptly withdrawn, we would recommend that the Congress legislate to put this regulation and the practices under it, however few in number, out of existence.

Dated: December 17, 1956.

Respectfully submitted, with unanimous approval of the subcommittee, and ordered published.

F. Edward Hébert,
Chairman, Subcommittee for Special Investigations.

Approved: December 17, 1956.

Carl Vinson,
Chairman, Committee on Armed Services.

[R. 23a] **Opinion of the Comptroller General of the United States**

Washington 25, Feb. 12, 1952.

The Honorable the SECRETARY OF THE ARMY.

MY DEAR MR. SECRETARY: Reference is made to your letter of January 11, 1952, with enclosures, requesting a decision as to whether an enforceable contract exists between the Government and John McShain, Inc., for certain construction work at Camp Ritchie, Maryland, covered by invitation No. ENG-49-080-52-13-(15), dated September 14, 1951.

The record shows that, at a conference held in the office of the District Engineer, Washington, D. C., on September 6, 1951, for the purpose of acquainting prospective bidders with the general nature of the work to be performed, the contractors present, including representatives of John McShain, Inc., were advised in part as follows:

> "The proposals will be opened in this room at 1500 hours on the 2nd of October, 1951. Negotiations will be conducted with those submitting the three lowest proposals to determine the final conditions and price."

The referred-to invitation was issued under date of September 14, 1951, and stated that proposals, which would be the basis of negotiating a construction contract, would be received until October 2, 1951. Of the proposals received, that of John McShain, Inc., was low at $6,574,825, the other proposals ranging from $7,944,010 to $11,509,980. The proposal did not contain any qualification and stated that the contractor would execute a contract within 30 days after date of opening and would commence work within 10 days after receipt of notice to proceed. It is stated in first indorsement of December 3, 1951, from the Division Engineer to the Chief of Engineers, that the Division Engineer, immediately after the results of the bidding were reported

to him, instructed the District Engineer to determine whether an error had been made by John McShain, Inc., in view of the relatively low bid submitted, but that when the District Engineer replied that the contractor was pressing for an award of the contract, authority to make such award was granted.

[R. 24a] In your letter of January 25, 1952, with reference to the matter, you state that, after the proposals were opened, the second and third lowest bidders indicated that, in view of the low proposal submitted by McShain, they were not interested in further negotiations as they could not approach the price; that the Corps of Engineers was cognizant that McShain was "able to pare certain administrative expenses because of the fact that a previous contract (No. DA-49-080-eng-833) was still in force"; and that on October 12, 1951, representatives of the contractor attended a conference—which is shown to have been held in the office of the District Engineer, Washington, D. C. "—for the purpose of discussing the proposal and settling any contract questions."

The record shows that three representatives of John McShain, Inc., none of whom were officers of the corporation, attended the conference of October 12, and that these representatives asked various questions relating to the performance of the work and gave no indications that John McShain, Inc., would not be willing to take the contract at the amount stated in its proposal. Mr. Paul Hauck, the contractor's general manager, who was present, did express some concern because the amount quoted did not include anything to cover contingencies, overtime, liquidated damages, or price and wage increases. On the same day, but subsequent to the conference, a formal notice was issued by the District Engineer to the contractor stating that its proposal, in the amount of $6,574,825, was thereby accepted, that a formal contract was being prepared, and that the contractor was to proceed with the work. The

contractor was requested in the notice to acknowledge receipt thereof in the space provided for the contractor's signature and to return the original and one copy to the office of the District Engineer at once, retaining a copy.

The record contains a memorandum made by the District Engineer of a conference held in his office with John McShain and Paul Hauck on October 24, 1951, which states that Mr. McShain stated at such time that he was willing to go ahead with the job, but that two of the trades, plumbers and steamfitters, had refused to man the job at the wage rates set forth by the Department of Labor, and the Baltimore unions were [R. 25a] requesting that the Ritchie project be placed within their district and were requesting an increase in wage rates, and that he thought it was the responsibility of the District Engineer to have the Department of Labor issue new wage rates in line with the Baltimore rates, or place the Ritchie project under jurisdiction of Hagerstown unions, which would mean lower rates. The memorandum states that Colonel McCutchen stated that the contractor would have to have the International Union state its refusal, in writing, to man the job at the rates published by the Department of Labor, in which case the matter would be submitted to the Chief of Engineers and be forwarded to the Department of Labor. In an affidavit filed with this Office by John McShain on January 28, 1952, it is stated that the affiant informed the District Engineer at this meeting that a serious mistake had been made in the computation of the bid, but that, by reason of the fact that the contractor had contract No. DA-49-080-eng-833 to perform, the contractor could probably "get by" with the contract involved. However, affiant further states that he advised the District Engineer that certain items would have to be adjusted and cleared up before any contract could be signed, or agreement reached, particularly the wage scale situation.

By letter of October 26, 1951, John McShain, as President of John McShain, Inc., advised the District Engineer that

the contractor had purposely delayed returning the notice to proceed in view of the serious problem of the wage scale which, it was believed, should be settled before any attempt was made to proceed with the work. Also, on November 7, 1951, the contractor, having received notice on November 5 of the termination for the convenience of the Government of what appears to have been the major portion of contract No. DA-49-080-eng-833, wrote the District Engineer that the cancellation of said contract had seriously affected its position on the contract here involved and requested a conference on November 14. At the conference, according to the memorandum in the record, John McShain stated that he had "bid" for the work here involved solely because of having been awarded contract No. DA-49-080-eng-833; that he had been prepared to absorb the loss due to his mistake by reason of having the first contract, and that he did not feel that he could possibly undertake [R. 26a] the work under the circumstances. Accordingly, he asked to be excused, stating that the contracting officer should have recognized that the bid was extremely low in comparison with the others and notified him of a possible mistake at the time.

The contractor contends before this Office that the mistakes in the calculation of its bid which were set forth in its letter of December 31, 1951, to you, were made because of the necessary haste in preparing its bid. In this connection, the contractor calls attention to the fact that the specifications for the work involved contain approximately 575 pages and, in addition, four addenda, of which two are dated September 20, 1951, and the others September 25 and September 26, 1951, and that extensive drawings formed a part of the requirements for a bid. In the affidavit referred to above, John McShain states that, on October 2, 1951, in reviewing the estimates which the contractor had received for the subcontracts and the information covering the work to be done by the contractor, some doubt arose in his mind as to the advisability of attempting

to submit a bid covering the work. However, he states that, in view of the statement which had been made to prospective bidders at the conference of September 6, 1951, to the effect that negotiation would be conducted with those submitting the three lowest proposals to determine the final conditions and price, he decided to submit a figure based upon the estimates that were available in the belief that any discrepancies arising could be taken care of before the contract was finally negotiated. The contractor contends that the notice of award was issued before any negotiations were held with representatives of the contractor who would be authorized to consummate a contract, and that, since the award of the contract never was finally accepted, no contract can be said to have been consummated.

The contractor's bid was considerably lower than the other bids and you have stated, as indicated above, that the Corps of Engineers was aware that the contractor would be able to pare certain administrative expenses by reason of having another contract to perform at the site of the work. Also, the contracting officer was advised from the statement made by Mr. Hauck at the meeting of October 12, referred to above, that the contractor's bid included nothing for contingencies. [R. 27a] Under these circumstances, the Department of the Army would have been under a duty to advise the contractor that the termination of contract No. DA-39-080-eng-833 was being considered before accepting its bid in the event it had any information to that effect. While you state in your letter of January 25, 1952, that the contracting officer had no knowledge that said contract would be terminated, it is not shown that other officials of the Department of the Army were unaware of such fact.

However, aside from the above question, there is the more fundamental one of whether a contract was ever consummated. The fact that prospective bidders were

advised at the pre-bid conference that negotiations would be conducted with those submitting the three lowest proposals to determine the final conditions and price and that the invitation stated that proposals would be received for the purpose of "negotiating" a construction contract would be calculated to lead bidders to believe that the contract was to be negotiated informally, rather than on a formal bid and acceptance basis. It is not denied in your letter of January 25 that negotiation with the bidders following receipt of the proposals was contemplated at the time the invitation was issued, but you state that the meeting of October 12 was considered to cover all the points subject to negotiation, since the price quoted apparently was acceptable to the contractor at that time.

Admittedly, the representatives of the contractor who were present at the meeting of October 12 should have stated at that time that the amount bid was not considered by the contractor to be firm. However, if as appears to be the case it is admitted that the contractor was entitled to negotiate the contract informally and that the proposal submitted was not, therefore, understood to be a firm proposal, then it necessarily follows that any negotiation had would not be binding on the contractor unless transacted with representatives of the contractor who were duly authorized to enter into a final and binding agreement. In this connection, there has been submitted here a "Certificate of Certification of Secretary of John McShain, Inc., of Delaware," wherein it is stated that the President and, in his absence or disability, the Vice-President, [R. 28a] are authorized by sections 31 and 33 of the by-laws of the corporation to execute bonds and other contracts requiring the seal, under the seal of the corporation, and that the only other persons authorized to perform such functions for the corporation are Vincent P. McDevitt, the corporation's counsel, and Edward S. Barnhart, Secretary of the corporation, who, jointly and severally, were appointed

attorneys-in-fact for the corporation at a special meeting of the Board of Directors held on July 5, 1949, and that their authority to perform such functions is operative only when the President and Vice-President of the corporation are absent from the country. Relative to the authority of Messrs. Hauck, Tippett and Russell, the representatives of the contractor who were present at the meeting of October 12, 1951, it is stated in the McShain affidavit as follows:

> All bids submitted by the Corporation must be approved by me before submission and Messrs. Hauck, Tippett and Russell have never been authorized to submit, nor have they ever submitted, a bid on behalf of the Corporation without securing such approval.
>
> Messrs. Hauck, Tippett and Russell have never been authorized to negotiate or accept, nor have they ever negotiated or accepted, a contract on behalf of the Corporation. On occasion they have communicated to contracting officers the fact that I have approved particular contracts, having obtained my approval before the meeting or during the course of the meeting by telephone.

Of course, the representatives referred to, who were not officers of the corporation, would have no implied authority to bind the corporation in a matter of this kind for the reason that negotiation of the contract necessarily included the execution of the contract and the payment and performance bonds, which were required to be signed by an officer of the corporation. Hence, it would seem that the proceedings which took place at the meeting of October 12 did not amount to a negotiation of a final contract, or have the effect of converting the contractor's proposal to a firm bid the purported acceptance of which created a contract. On the contrary, there is substantial basis for

the view that the notice of award and notice to proceed [R. 29a] which was issued to the contractor on October 12, 1951, constituted no more than a firm offer on the part of the Government to award the contract to the contractor at the price stated in its proposal and, as such, would have had to have been accepted without qualification by the contractor in order for a contract to be consummated. As indicated above, the contractor never returned the referred-to notice with its signature, as contemplated, and there is considerable doubt that a court would hold that the statement reported by the District Engineer to have been made by John McShain at the meeting of October 24, 1951, to the effect that he was willing to go ahead with the work, constituted an acceptance of the offer of award, particularly in view of the fact that McShain reportedly followed such statement immediately with the statement that he thought it was the responsibility of the District Engineer to take action to the end that certain wage-rate problems could be resolved, and of the contention made in McShain's affidavit, referred to above, as to the conditional nature of the offer. Moreover, the contractor's letter of October 26, 1951, the contents of which are set out above, is capable of being interpreted as a conditional acceptance only. The negotiations were in this status when, on November 14, 1951, the contractor advised the District Engineer that it would be unable to undertake the work in view of the termination of contract No. DA-49-080-eng-833. Hence, under the facts developed from the evidence presented here, and considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was ever consummated, or that John McShain, Inc., has incurred any liability under its bid.

The copy of contract No. DA-49-080-eng-856, the specifications thereto and abstract of bids, as well as copy of contract no. DA-49-080-eng-833, are returned herewith. The

other papers transmitted with your letter are being retained in this Office.

Sincerely yours,

(S) LINDSEY C. WARREN,
Comptroller General,
of the United States.

Enclosures.

In the Federal Bar Journal Vol XIV October-December 1954, No. 4 appears an article entitled "The General Accounting Office in Government Procurement" by the Assistant General Counsel of the General Accounting Office, J. Edward Welch.

On page 322:

"As a protection against adverse action (exceptions) in the post audit, disbursing officers, certain certifying officers in the Executive Branch, and the heads of all Government agencies may apply to the Comptroller General for a decision on any question involving a payment to be made by them. 31 U.S.C. 74 and 82d. Also, in order to minimize delay in making award of Government contracts, contracting officers may, if contracting agency procedure permits, submit directly to the Comptroller General for advance decision questions involving mistakes in bids. 16 Comp. Gen. 565.

"Thousands of such requests for decision are received and passed upon annually by the Comptroller General. Thousands of claims by and against the Government are also submitted to and handled by the Office each year."

* * * * * * *

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No. 228

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN McSHAIN, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEO. COCHRAN DOUB,
Assistant Attorney General,
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OPINIONS BELOW

The oral opinion of the district court (R. 38a-39a) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 3a-7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1958 (Pet. 8a). Petitioner's timely motion for rehearing was denied on June 10, 1958 (R. 120). The petition for certiorari was filed on July 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the documents exchanged by the parties constituted a contract.

STATUTES INVOLVED

The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151, *et seq.*, provides in pertinent part:[1]

> Sec. 2. * * * (c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> (1) determined to be necessary in the public interest during the period of a national emergency * * *
>
> * * * * *
>
> Sec. 3. Whenever advertising is required—
>
> (a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.
>
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid,

[1] Since this case arose, the act has been recodified, with minor changes, as 10 U.S.C. 2301, *et seq.* (Supp. IV).

conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided, That all bids may* be rejected when the agency head determines that it is in the public interest so to do.

31 U.S.C. 74 (42 Stat. 24, as amended) provides in pertinent part:

* * * * *

Disbursing officers, or the head of any executive department, * * * may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

STATEMENT

The Government brought this action against petitioner for damages for refusal to perform a contract to construct a building (R. 2a-3a). Petitioner answered that no contract had been consummated (R. 19a). At the trial the Government introduced the following three documents as proof of the contract:

The Request for Proposals (Exh. A, R. 42a). The Government issued to the petitioner and other builders a "Request for Proposals" containing detailed specifications for the proposed project and providing (R. 43a):

1. Proposals in duplicate will be received until * * * 2 October 1951, for the purpose of negotiating a construction contract for * * * the above-described project * * *.

2. Proposals will be submitted in sealed envelopes upon the attached Form * * *. The proposer who is awarded the Contract will be required to execute the Department of the Army Contract Form for construction (R-5701) * * *.

3. The right is reserved, as the interest of the Government may require, to reject any and all proposals and to negotiate with any proposer.

The Contractor's Proposal (Exh. B, R. 60a-64a). In response to the Request the petitioner submitted, on the form supplied by the Government, a proposal stating:

> In compliance with your Request for Proposals * * * the undersigned hereby proposes to * * * perform all work for the above described project * * * for the consideration of * * * $6,574,825.00. * * * and agrees, upon receipt of written notice of an award of the contract within thirty days after the date of opening of the proposal, that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *.
>
> The bidder further agrees that, if awarded the contract, he will commence the work within 10 calendar days after receipt of written notice to proceed * * *.
>
> * * * * * *
>
> Condition: Bidders are advised that the award for this work will be made to one Bidder on Proposal Nos. 1 and 2. The right is reserved, as the interest of the Government may require, to accept or re-[ject] any or all items of any proposal.
>
> [Signature.]

Notice of Award and Notice to Proceed (Exh. C, R. 64a). In response to this Proposal, the Government wrote petitioner as follows:

> You are hereby notified that your proposal dated 2 October 1951, in the total amount of $6,574,825.00 for Proposals Nos. 1 and 2 is accepted * * *. This is your formal notice to proceed with the work under the contract. * * *

Nonperformance having been admitted by the answer and the issue of damages having been reserved for a separate trial, the Government rested its case. Petitioner thereupon moved to dismiss the action for failure to establish a prima facie case, contending that its "Contractor's Proposal" was not a firm offer. The district court granted the motion and dismissed the action with prejudice. The court of appeals unanimously reversed, finding in the documents "a text-book example of a contract" (Pet. 6a). It remanded the case to the district court to allow the petitioner to present its case.

ARGUMENT

This case presents an elementary question of contract law on which the decision below is clearly correct. There is no occasion for review by this Court.

1. The documents exchanged present, as the court of appeals said, "a text-book example of a contract." Petitioner contends, however, that § 2(c)(1) of the Armed Services Procurement Act of 1947, under which the contract was made, prohibited the Army from accepting the offer without first "haggling" for a better

price.[2] The contention is frivolous. In permitting certain contracts to be "negotiated * * * without advertising" (§ 2(c)), the act merely excepted such procurements from the restrictions imposed when "advertising is required" (§ 3). It created not a duty to "negotiate" but a freedom not to "advertise."[3]

2. Petitioner argues that the Government is bound by a prior decision of the Comptroller General that there was no contract. But even if the Comptroller General had authority to bind the executive department on a question of law (but see *Climatic Rainwear Co.* v. *United States*, 115 C. Cls. 520, 533), he did not exercise it. The letter (Pet. 34a-42a) does not purport to settle or adjust any claim, or even to decide finally whether there was a contract. Rather, in response to a request by the Secretary of the Army and on the basis of facts not yet introduced into evidence in this case, the Comptroller General simply advised the Secretary that "considering the ambiguities, uncertainties, and confusion which attended the entire transaction, there appears no clearly sound basis for concluding that a contract was consummated" (Pet. 41a). This was no more than advice to the Secretary that he would be justified in releasing the contractor from his bid and reletting the contract and that, if he decided to do so, his action

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[2] Even if it did, the requirement would be solely for the benefit of the Government—to assure the best price—and could not be invoked by the contractor. See *American Smelting & Refining Co.* v. *United States*, 259 U.S. 75; *United States* v. *New York & Porto Rico S. S. Co.* 239 U.S. 88.

[3] See 32 C.F.R. § 3.101: "negotiation means that method of procurement under which the procedures for procurement by formal advertising * * * are not required." Substantially the same definition was adopted in the 1956 revision and codification of the act: "'Negotiate' means make without formal advertising." 10 U.S.C. 2302(2) (Supp. V).

would not thereafter be questioned by the Comptroller General. Cf. 31 U.S.C. 74, *supra*, p. 3.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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AUGUST, 1958.

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